Republic v Othim (Criminal Appeal E026 of 2021) [2024] KEHC 5030 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E026 OF 2021

KW KIARIE, J

MAY 15, 2024

BETWEEN

REPUBLIC .... APPELLANT

AND

FLORENCE AKINYI OTHIM .... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E044 of 2020 of the Chief Magistrate's Court at Homa Bay by Hon. T. Obutu–Principal Magistrate)

JUDGMENT

1. Florence Akinyi Othim, the respondent herein, was acquitted of the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*.
2. The particulars of the offence are that on the 10th day of September 2020, at Kaura village, Rangwe sub-county, within Homa Bay County, jointly with others not before the court, wilfully and unlawfully destroyed a barbed wire fence valued at Kshs.158,859/=, the property of Paul Odhiambo Olang'o.
3. The state was dissatisfied and filed this appeal based on the following grounds:
    a. That the learned trial magistrate erred in law and fact in failing to satisfy the principles to be applied to his impugned judgment under section 339(1) of the *Penal Code*.
    b. That the learned magistrate erred in law and fact when he relied on contradictory and unreliable evidence to acquit the accused person.
    c. That the learned magistrate erred in law and fact in failing to properly and constructively evaluate the entire evidence of the prosecution on record.
    d. That the learned magistrate erred in law and fact in failing to record all the evidence adduced by the prosecution to sustain a conviction.

e. That the learned magistrate erred in law and, in fact, in failing to exercise neutrality before making his decision.

f. That the learned magistrate misdirected himself in fact and law by not appreciating that the defence did not produce any proof of service of the summons of the day of the survey upon the complainant part from mere allegations that he was served.

g. That the learned magistrate erred in law and fact when he failed to appreciate that the charge before the court was for malicious damage to the complainant's property and not that of a boundary dispute.

h. The learned magistrate erred in law when he failed to rely upon the evidence of PW1 to convict the respondent; four other witnesses corroborated this.

4. The respondent opposed the appeal and contended that the complainant had encroached on her land.

5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

6. For the trial magistrate to make a finding that the respondent had maliciously damaged the property of the complainant herein, either of the following circumstances ought to have been proved beyond a reasonable doubt:

a. That the complainant owned the damaged property or

b. That the complainant had leased the land on which the fence stood from the complainant or from a third party who had title to the land.

c. That the complainant was not a trespasser.

7. The complainant was economical with his evidence. Though he admitted that the area assistant chief was present, he said he was unaware of a boundary dispute. He equally denied that he had been summoned to be in attendance.

8. In her defence, the respondent produced documents showing that the complainant had been summoned to attend the boundary ascertainment but chose to be away. He resurfaced when the fence he had erected was inside the respondent's land.

9. It would appear that the prosecution was motivated by other considerations, not justice. If a criminal offence was committed, there is no explanation as to why the assistant chief (DW3) and the surveyor (DW2) were not charged, yet they were available.

10. The complainant, having trespassed into the complainant's land, cannot purport that a crime was committed against him. I agree with the respondent that he cannot benefit from his crime. In the case of *Kahuhu Wang'ang'a v Republic* [2002] eKLR, Mbogholi Msagha J (as he then was) held:

> The key words in an offence of malicious damage to property are that the damage must have been done "wilfully" and "unlawfully". That wilful and unlawful act carries with it the intention and cannot, therefore, be complete unless mens rea is proved. Above all, the said act must be attributed to the person charged "directly". I emphasize the word "directly" because, in an offence of this nature, unlike in a civil jurisdiction, vicarious liability cannot attach. This is because malice, by its own nature is a conception of the mind which cannot be assigned. And so, in the instant case, the prosecution was duty bound to prove beyond

any reasonable doubt that the appellant did wilfully and unlawfully damage the alleged properties.

11. In the instant case, the trial magistrate correctly applied the evidence to the law and reached the correct decision. The appeal lacks merit, and the case is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MAY 2024.

KIARIE WAWERU KIARIE

JUDGE